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Navigating the I-601A Process

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Frustration has been felt by many who have attempted the newly enacted regulation which allows certain immediate relatives to file a provisional waiver for beneficiaries while they remain in the United States through adjudication of the waiver. Denials issued by the NBC include lack of hardship with no attendant RFE issued as well as for a more than liberal use of a finding that a reason to believe a ground of inadmissibility may exist. While the new regulation is promising in theory, kinks in the system have yet to work out leading to inconsistent results across the board in the adjudication of these waivers. Growing pains however are to be expected as the rule was recently finalized in January of 2013 and its provisions went into effect on March 4, 2013 and it is with great hope that USCIS will properly address problematic areas within the adjudications process.¹ The rule is codified in Chapter 8 of the Code of Federal Regulations primarily in sections 103 and 212. The purpose of the regulatory change is to reduce the time period of separation of family members while pursuing immigrant visas abroad when an applicant faces an unlawful presence bar.²

A. Who Qualifies

USCIS has limited the stateside provisional waiver to immediate relatives. Specifically, an immediate relative must have filed the immigrant petition. Further, the qualifying relative must also be an immediate relative in the form of a spouse or parent. Although the regulation is presently limited to immediate relatives, commentaries have indicated the potential to expand its inclusion to other preference categories in the future.³ The new sections in the federal regulations apply to applicants who are seventeen years of age or older and who are children or spouses of U.S. citizens or who are a parent of a USC who is 21 years old or older.⁴ Stepchildren, CSPA protected applicants and (when appropriate) widows are also covered under the provisions if they fall in the immediate relative category.

Besides the requisite immediate relative designation, applicants must be present in the U.S. when filing the petition and be available to appear for biometrics to be taken. Further, the individual must be inadmissible solely under INA 212(a)(9)(B)(i)(I) or (II) also known as the three/ ten year bar up to the point of the consular interview. Finally, an approved I-130 (or similar petition) must be approved, pending with DOS, and immigration fees paid precedent to the waiver filing. No fee waivers will be available for the provisional waiver fee or biometric fee.

Those family members who are *not* included within the regulatory provisions include anyone falling under a preference category such as adult children, siblings of US citizens, and spouses and children of legal residents. Further those under 17 years of age will not qualify. Most applicants under

¹ See 8 CFR 103; 8 CFR 212.7.

² See Department of Homeland Security 8 CFR parts 103 and 212, CIS No. 2519-2011; DHS Docket No. USCIS-2012-0003, RIN 1615-AB99; 78 Fed Reg 536.

³ See 78 Fed Reg 537, 542 (discussing that limiting to IR categories gives an incentive for people to naturalize)

⁴ See *id.* 557.

the age of 18 will not require unlawful presence waivers anyway since they do not accrue unlawful presence for purposes of the three and ten year bar.⁵

B. Procedure

CIS began to accept the stateside waiver requests for eligible filers beginning March 4, 2013. The process begins with an immediate relative petition. After an I-130 has been approved the immigrant visas fees must be paid to the NVC. After the NVC fees have been paid actual notice should be sent via email to the NVC that the applicant intends to pursue the stateside waiver process.⁶ This notification email should include the biographical information about the petition as well as the attorney's information. Once the NVC fees have been paid and notice has been sent to the NVC regarding the applicant's intent to file for the provisional waiver the applicant is clear to file for the waiver. The waiver is submitted on form I-601A and requires the accompanying fees of \$585 and \$85. Fee waivers are not available. Evidence that must be submitted with the waiver application includes proof of the approved I-130 and a fee receipt showing that the immigrant visa processing fee has been paid. After the submission of an I-601A application USCIS has the authority to schedule an interview through local District Offices if concerns exist such as suspected fraud. Thus far interviews have seldom occurred.⁷

Once the application is submitted CIS will undertake an initial review of the application to identify any possible disqualifying grounds of inadmissibility.⁸ These evaluations are based on a "reason to believe" standard. CIS has taken the position further in that they will conduct a limited review to determine if the applicant has a self-reported ground of inadmissibility that would render him or her ineligible for the provisional waiver, the results of the background checks reveal conduct or actions that *potentially* would make an applicant ineligible for an immigrant visa, and whether the individual has engaged in activities that could affect a favorable exercise of discretion.⁹ The adjudication process is generally completed within a six month period with many waiver applications approved or denied within three to four months.

Once an application passes the initial review and is approved CIS will work closely with DOS to align an approved provisional waiver with a soon thereafter consular appointment.¹⁰ The NVC once it has an approved I-601A as well as the DS packets will conduct a final review typically within about two weeks and if the documentation is complete will then send the visa application and approved provisional waiver to the designated post. The time frame from that point for the final consular interview follows rather quickly depending on the consular location. For instance, Juarez has been scheduling interviews within six weeks and often within three weeks of receiving the case from the NVC.

⁵ See AILA Practice Advisory, Unlawful Presence and INA 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) : A Summary of the May 6, 2009 Interoffice Memorandum from Donald Neufeld, Lori Scialabba, and Pearl Chang revising the adjudicators Field Manual by Laura Lichter and Mark R Barr, pp. 9-10.; See also INA §212(a)(9)(B).

⁶ The email address is NVCi601a@state.gov.

⁷ See 78 Fed Reg 557.

⁸ See *id.* at 547. The reason to believe determinations are not conclusive findings of inadmissibility but may still disqualify someone from the provisional waiver process; see *eg id.* p. 546.

⁹ See *id.*

¹⁰ See *id.* at 536, 555. An estimate of the time frame between approval and appointment is 30-60 days.